

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

**RESPONDENT'S MOTION IN LIMINE
TO EXCLUDE TESTIMONY OF JEFFREY JOHN DEL FUOCO
AND SUPPORTING MEMORANDUM OF LAW**

The Honorable Gregory P. Holder ("Judge Holder" or "Respondent"), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission ("the Panel") this Motion in Limine to Exclude Testimony of Jeffrey John Del Fuoco and Supporting Memorandum of Law ("Motion").

1. Jeffrey John Del Fuoco ("Del Fuoco") is an Assistant United States Attorney for the Middle District of Florida.

2. On December 8, 2003, Judge Holder's counsel requested permission from the United States Department of Justice ("DOJ") to depose Del Fuoco.¹ Similarly, on December 15, 2003, the Judicial Qualifications Commission ("JQC") requested permission from the DOJ to allow Del Fuoco to testify at the final evidentiary hearing. *See* Exhibit 1.

¹ Del Fuoco is noticed for deposition before the expiration of the discovery cutoff. At this time, Judge Holder is unsure if Del Fuoco's scope of testimony will be expanded. Therefore, Judge Holder is filing this motion to preserve his objection. If appropriate, a supplemental memorandum will be filed to update the Panel following Del Fuoco's deposition.

3. A DOJ employee may only testify to those “facts” or areas of inquiry which are pre-approved by the responsible U.S. Attorney. 28 C.F.R. §§ 16.21 *et. seq.*

4. Acting under the authority of 28 C.F.R. §§ 16.21 *et. seq.*, the United States Attorney for the Middle District of Florida, Paul I. Perez (“Perez”) imposed restrictions on the nature and extent of the testimony which Del Fuoco is authorized to provide. *See* Exhibit 2.

5. These restrictions limit Del Fuoco’s testimony solely to those facts that the JQC seeks to establish; *i.e.*, the identification of the documents provided to the JQC and nothing more. *See* Florida Judicial Qualification Commission’s Prehearing Statement, filed August 25, 2004.

6. The Panel does not have the authority to compel Del Fuoco to exceed the scope of the testimony set forth by Perez. *See State v. Tascarella*, 580 So. 2d 154 (Fla. 1991).

7. To allow Del Fuoco to testify only to those topics enumerated by Perez violates Judge Holder’s due process rights, and is highly prejudicial to Judge Holder’s defense.

8. Finally, under Section 90.403, Florida Statutes, the prejudicial nature of the evidence outweighs any probative value.

This Motion seeks to exclude all testimony of Del Fuoco. The grounds upon which this Motion is based are set forth below in the supporting Memorandum of Law.

MEMORANDUM OF LAW

I. BACKGROUND

Del Fuoco alleges that in early 2002 an unmarked envelope was anonymously placed under his office door at the United States Army Reserve Headquarters in St. Petersburg. *See Affidavit of Jeffrey J. Del Fuoco*. Del Fuoco claimed that the envelope contained a typewritten note with words to the effect:

I thought you would be interested in this or something should be done about this.

See id. The note was signed “A concerned citizen” or “A concerned taxpayer.”

See id. Along with the note was an alleged copy of the Air War College (“AWC”) paper that Judge Holder had submitted to the AWC four years (now almost seven years) earlier; *i.e.*, the purported Holder paper (“PHP”). Also included was a copy of a paper purportedly authored by David Hoard (the “Hoard Paper”), the paper from which Judge Holder allegedly plagiarized. *See id.*

For unexplained reasons, the Assistant United States Attorney’s Office waited almost a year before forwarding the documents. *See id.* Ultimately, in January 2003, the United States Attorney’s Office provided the remaining

documents to the Air Force, advising that it appeared that a significant portion of the PHP had been copied verbatim, or substantially verbatim, from the Hoard Paper. As a result, the Air Force instituted an investigation to determine if Judge Holder had:

- 1) plagiarized the paper submitted to the AWC in 1998; and
- 2) made a false statement when he certified that the paper he submitted was his original work.

Following the completion of the Air Force's investigation, on December 19, 2003, Major General Fiscus, The Judge Advocate General of the Air Force, having fully considered all of the evidence, restored Colonel Holder's designation as a Judge Advocate.

On July 16, 2003, the JQC filed a Notice of Formal Charges (the "Charges") asserting that probable cause existed to institute formal proceedings against Judge Holder to determine whether he had:

- 1) plagiarized a paper submitted to the MacDill Air Force Base AWC in 1998; and
- 2) made a false statement when he certified that the paper he submitted was his original work.

These charges rest solely upon the documents provided to the JQC by Del Fuoco.

On December 8, 2003, Judge Holder's counsel requested permission from the United States Department of Justice ("DOJ") to depose Del Fuoco. Similarly,

on December 15, 2003, the JQC requested permission from the DOJ to allow Del Fuoco to testify at the final evidentiary hearing. *See* Exhibit 1. In response, on December 18, 2003, United States Attorney Paul I. Perez (“Perez”) authorized the deposition as well as the testimony at the final hearing, but restricted Del Fuoco’s testimony to the following:

- 1) to identify copies of the alleged plagiarized paper;
- 2) to identify copies of the Hoard Paper from which the plagiarized material was taken;
- 3) to identify the letter dated December 20, 2002, referring the matter to the JQC; and
- 4) to identify the documents he received from Assistant United States Attorney Kenneth Lawson which bear bates stamp numbers KELjd1 - KELjd71.

See Exhibit 1.

II. APPLICABLE LAW

The restrictions placed on the scope of Del Fuoco’s testimony are unreasonably narrow and result in extreme prejudice to Judge Holder’s defense.

A. Judge Holder has federal and Florida due process right to fully cross-examine any witness presented by the JQC.

Del Fuoco’s testimony is crucial to this proceeding. The origin of the charges against Judge Holder stems from events to which Del Fuoco is a key witness. The scope of testimony determined by Perez specifically limits Del

Fuoco's testimony to the identification of documents which form the basis for the charges in this matter, *i.e.*, those facts that the JQC seeks to establish. These restrictions do not accommodate Judge Holder's right to cross-examine Del Fuoco. They effectively preclude Judge Holder from confronting the witness who has provided the primary, if not sole, evidence that forms the basis of the charges against him.

In a similar proceeding,² the Florida Supreme Court held that confrontation, cross-examination, and a fair trial are essential ingredients of due process. *Sheiner v. State*, 82 So.2d 657 (Fla. 1955); *Petition for Revision of, or Amendment to, Integration Rule of the Florida Bar*, 103 So.2d 873 (Fla.1956). Confrontation and cross-examination under oath must be afforded to protect Judge Holder's due process rights, because they are the only method to test the probity of the evidence and discredit or eliminate what is spurious or of doubtful veracity. *See id.*

Should Del Fuoco testify at trial, Judge Holder will be prevented from questioning Del Fuoco regarding, among other things, the following:

- 1) the circumstances surrounding Del Fuoco's alleged discovery of the PHP and Hoard Paper in early 2002 at the United States Army Reserve Headquarters in St. Petersburg, Florida;

² The principles enunciated in disciplinary cases relating to attorneys are applicable to a degree in judicial discipline cases. *In Re Boyd*, 308 So.2d 13 (Fla. 1975), *superseded on other grounds*, 357 So.2d 152.

- 2) the envelope and letter that purportedly accompanied the PHP and Hoard Paper allegedly found by Del Fuoco, which apparently are now missing;
- 3) the circumstances surrounding Del Fuoco's alleged discovery of an additional 171 pages of documentation in his off-site storage unit in October 2003;
- 4) actions taken by Del Fuoco upon discovering the documents in early 2002 and October 2003; and
- 5) the chain of custody of the documents after they were discovered by Del Fuoco.

Additionally, there are serious issues concerning Del Fuoco's credibility that are relevant to the veracity of his testimony.

Without the opportunity to fully cross-examine Del Fuoco, Judge Holder is left with no way to test the veracity of Del Fuoco's testimony; test Del Fuoco's recollection of the events surrounding his finding of the documents; identify any bias that Del Fuoco may have; and assure that the integrity of the documents was properly maintained from when they were found until they were finally provided to the JQC. In short, to prevent Judge Holder from cross-examining Del Fuoco violated Judge Holder's federal and Florida due processes right.

B. The scope of testimony authorized by Perez is so narrow that it is tantamount to a denial of Judge Holder's request to depose Del Fuoco.

The Florida Rules of Civil Procedure allow discovery of any matter relevant to the subject matter of the pending action. Fla. R. Civ. P. 1.280. The Rules do not

limit the subject matter of a deposition to those things that the deponent, or in this case his employer, feels are relevant. If a party exceeds the scope of permissible discovery, the Rules have a procedural safeguard. *See id.* By moving for a protective order, a party can have the Panel review and limit the discovery requests to topics the Panel decides are relevant. In this case, Perez has made that decision for the Panel and defined the scope of relevant testimony by Del Fuoco. Judge Holder's topics of inquiry outlined above lie squarely within the realm of permissible discovery. Perez, acting in his capacity as a United States Attorney, has limited the scope of permissible discovery by Judge Holder and prevented him from conducting a meaningful examination of Del Fuoco at trial.

Where a federal agency will not allow its employee to be deposed, the Florida Supreme Court held that exclusion of all testimony is appropriate. *State v. Tascarella*, 580 So.2d 154 (Fla. 1991). In *State v. Tascarella*, several DOJ employees were noticed for deposition. The DOJ instructed its employees not to attend the depositions. The trial court excluded all trial testimony of the DOJ employees, and the State appealed. Because Tascarella "would be prejudiced if forced to confront these witnesses at trial without pretrial discovery," the Florida Supreme Court agreed that exclusion of the DOJ employees' testimony was proper. *Id.*

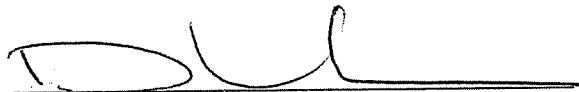
The facts of the instant case are even more compelling than those of *Tascarella*. In *Tascarella*, the DOJ witnesses were prohibited from attending their depositions. This resulted in neither Tascarella nor the State being able to depose the witnesses prior to trial. However, in the instant case the DOJ agreed to allow Del Fuoco to be deposed pursuant to a scope of examination engineered by Perez — a scope that includes only those facts that the JQC needs to elicit from Del Fuoco. From the JQC's standpoint, any testimony from Del Fuoco, other than his identification of the documents that are the basis of the charges against Judge Holder, is unnecessary. It is Judge Holder, and Judge Holder alone, who needs to exceed the scope of testimony determined by Perez. To allow the JQC and DOJ to orchestrate such testimony and to exercise control over the scope of the defense would be inconsistent with due process and clearly contrary to the Florida Supreme Court's opinion in *Tascarella*.

Because the limits imposed by Perez impermissibly restrict the scope of Del Fuoco's testimony, this Panel must exclude his testimony, in its entirety, at the Final Hearing.

WHEREFORE, Judge Holder respectfully requests that the Panel grant his Motion in Limine and exclude all testimony and affidavits of Jeffrey John Del Fuoco at the final hearing.

Dated: August 25, 2004

Respectfully Submitted,



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Counsel for Judge Gregory P. Holder

CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing has been served by telecopier to: Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.



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PRIVILEGED AND CONFIDENTIAL

December 8, 2003

James R. Clindt, Esq.
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VIA FACSIMILE (904) 301-6310
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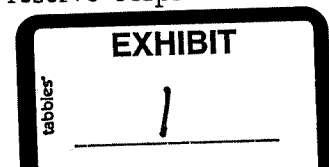
Re: Before The Florida Judicial Qualifications Commission
Inquiry Concerning a Judge No. 02-487
Supreme Court Case No.: SC03-1171

Deposition Subpoenae for Jeffrey J. Del Fuoco and Jeffrey S. Downing

Dear Mr. Clindt,

I have been referred to you in the course of to my conversations on Friday afternoon, December 5, 2003, with Warren Zimmerman and Gregory W. Kehoe, both of whom are familiar with the above-referenced matter involving Judge Gregory P. Holder. The JQC has authorized issuance of subpoenae for the above-referenced federal employees. As you can see in the attached document, the JQC, through Charles Pillans, indicated that it intended to call Mr. Del Fuoco as a witness. As yet, it has not noticed him for deposition. Mr. Pillans is agreeable to December 16 or 17 in Tampa. The discovery cut off is December 17, 2003, as the final evidentiary hearing is scheduled for January 20, 2004.

After my review of the relevant sections of the Code of Federal Regulations I can state that the subject matter of the deposition does not involve an issue under investigation by the Department. Mr. Del Fuoco's testimony is sought regarding actions performed in his status as a member of the United States Army reserve corps and his participation in the separate Air Force and JQC investigations.



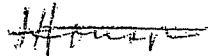
James R. Clindt, Esq.
First Assistant U. S. Attorney
Department of Justice
December 8, 2003
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No information relating to or based upon material contained in the files of the Department of Justice or information acquired as part of the performance of Mr. Del Fuoco's duties is sought. Nothing in his testimony would bring to bear any of the matters barring such testimony as set forth in Title 28 CFR § 16.23(b). Similarly, Mr. Downing's limited participation can be gleaned from the documentation attached to this correspondence.

I will contact your office tomorrow morning to discuss this matter in further detail.

Thank you for your attention to this matter.

Very truly yours,



Virginia Zock Houser

cc: Warren Zimmerman, Esq.
Gregory W. Kehoe, Esq
Lt. Col. Lauren Naumann-Johnson, USAF

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PIP/rgd

via Facsimile and U.S. Mail

December 18, 2003

Charles P. Pillans, III, Esq.
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Re: JOC Inquiry No. 02-487

Dear Mr. Pillans:

This is in response to your letter of December 15, 2003 to AUSA Jeffrey S. Downing. Pursuant to the provisions of 28 C.F.R. §§ 1621 et seq., I am authorizing AUSA Downing, AUSA Jeffrey Del Fuoco and AUSA Kenneth Lawson to give testimony at a Judicial Qualifications Commission Hearing scheduled to begin January 20, 2004 in Tampa in regards to the following limited areas:

1. to identify copies of the alleged plagiarized paper;
2. to identify copies of the paper written by Lieutenant Colonel Hoard from which the plagiarized material was taken;
3. to identify the letter dated December, 20, 2002 referring the matter to the Judicial Qualifications Commission;
4. as to AUSA Del Fuoco only, to identify the documents he received from AUSA Lawson which bear date stamps numbers KELjd1 -KELjd 71;
5. as to AUSA Lawson only, to identify the papers which he gave to AUSA Del Fuoco.

This authority does not extend to any questions directed to AUSA Downing or AUSA Del Fuoco "to explain briefly the investigation by the U.S. Attorneys Office, specifically, the beginning and ending dates that the file was open." It is the policy of this Office neither to confirm or deny the existence of an investigation.

Very truly yours,

PAUL I. PEREZ
United States Attorney

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December 18, 2003

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Re: JOC Inquiry No. 02-487

Dear Ms. Houser:

This is in response to your letter of December 8, 2003 to First Assistant United States Attorney James R. Klindt. You have asked for authority to depose AUSA Jeffrey Del Fuoco and AUSA Jeffrey Downing in the referenced Florida Judicial Qualifications Commission matter. While you have not specified your areas of inquiry, you represent that it is being conducted pursuant to the provisions of 28 C.F.R. §§ 1621 et seq.

This letter authorizes the depositions of AUSA Del Fuoco and AUSA Downing but only as to those matters contained in items 1 through 5 of my December 18, 2003 letter to Mr. Charles Pillans.

Very truly yours,


PAUL I. PEREZ
United States Attorney

cc: Charles P. Pillans, Esq.

EXHIBIT

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